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No. 751

In the Supreme Court of the United States

OCTOBER TERM, 1958

WILLIE HUGH DAILEY, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals is reported at 261 F. 2d 870.

JURISDICTION

The judgment of the Court of Appeals was entered on December 23, 1958. A petition for rehearing was denied on February 11, 1959. The petition for a writ of certiorari was filed on March 5, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether narcotics agents had authority to arrest petitioner without a warrant on knowledge that a narcotics offense had two weeks previously been committed by petitioner, so that admissions made immediately after the arrest were properly admitted in evidence.

2. Whether the trial court properly refused to receive testimony of a proposed character witness on the ground that the witness was unable to testify to petitioner's reputation.

STATEMENT

In the United States District Court for the Southern District of Georgia, petitioner was convicted on two counts charging two sales of morphine without written order form on two different dates, in violation of 26 U.S.C. (Supp. V) 4705(a). He was given concurrent sentences of five years on each count (R. 1-2, 155-156). On appeal, the judgment was affirmed.

The evidence for the government showed that federal narcotic agent Gaffney, posing as a merchant seaman, went to the pharmacy where petitioner was employed on April 16, 1957.[1] He showed petitioner a mariner's identification card and gave petitioner $100. Petitioner handed Gaffney a toothpaste carton inside of which were 20 tablets of a substance subsequently identified as morphine (R. 5-10, 71-72). On

[1] A special employee had previously called petitioner by telephone saying he was sending over a friend with a hundred dollars to spend (R. 62-64).

April 25, for $100, petitioner again sold Gaffney twenty grains of morphine, again enclosed in a tooth-paste carton (R. 10-12, 72).

On May 9, 1957, at around 11:00 A.M. (R. 85), two other agents went to petitioner's home, asked him to accompany them, and placed him under arrest (R. 13, 51). They brought petitioner to their car where Gaffney, still posing as a seaman, was seated. The agents asked petitioner whether he had ever seen Gaffney before. Petitioner denied having done so. The agents said Gaffney had been picked up with narcotics which he had obtained from petitioner. Petitioner denied this. When asked if he would take a lie detector test, petitioner admitted the sale. He also admitted sales to another person (R. 16, 21-22, 36-37, 59-60).

ARGUMENT

1. Petitioner contends that, since the agents had time to get a warrant in view of the two-week interval between the last sale to Gaffney and the arrest, his arrest without a warrant was illegal and, consequently, that his oral admissions, made immediately after the arrest, were inadmissible. However, by the Narcotic Control Act of 1956, 26 U.S.C. (Supp. V) 7607, Congress specifically conferred upon narcotic agents the power to "make arrests without warrant for violations of any law of the United States relating to narcotic drugs * * * where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested

has committed or is committing such violation."[2] The legislative history shows that this was designed to give narcotics agents powers comparable to those presently enjoyed by agents of the F.B.I. (Sen. Rep. 1997, 84th Cong., 2nd Sess., pp. 14-15), which are in turn equivalent to the powers of police officers at common law.[3] Those common law powers include the right to arrest without a warrant, on reasonable cause to believe that a felony has been committed by the person arrested, even though the arresting officers had time to get a warrant. *United States* v. *Perez*, 242 F. 2d 867 (C.A. 2), certiorari denied, 354 U.S. 941. At the time of the adoption of the Constitution and ever since, except when the rule has been changed by statute, it has been established law, in England and in the federal and state courts, that a peace officer may arrest on reasonable cause to believe that a felony has been committed and that the person arrested has committed it. 2 Hale, *Pleas of the Crown* (1847), pp. 84-97; 4 Blackstone, *Commentaries* (1900), 290-295; 2 Hawkins, *Pleas of the Crown* (1787), pp. 128-130; Wilgus *Arrest Without a Warrant*, 22 Mich. L. Rev. 541, 673, particularly at 548-

[2] This statute was not in effect at the time of the arrest involved in *Giordenello* v. *United States*, 357 U.S. 480.

[3] At the time of the decision in *United States* v. *Coplon*, 185 F. 2d 629 (C.A. 2), certiorari denied, 342 U.S. 920 (on which petitioner relies, Pet. 8), the F.B.I. had more limited powers of arrest. The statute was thereafter amended to give F.B.I. agents the general power to arrest without a warrant on reasonable ground to believe that a felony had been committed. 18 U.S.C. 3052, as amended by the Act of January 10, 1951, 64 Stat. 1239.

550 and 685-689; *Carroll* v. *United States*, 267 U.S. 132, 156-157; *Kurtz* v. *Moffitt*, 115 U.S. 487, 504; *Rohan* v. *Sawin*, 5 Cush. (Mass.) 281, 284-285; *Wakely* v. *Hart*, 6 Binn. (Pa.) 316, 318-319; *Samuel* v. *Payne*, 1 *Dougl.* 359 (K.B.); *Beckwith* v. *Philby*, 6 B. & C. 635 (K.B.) As Wilgus makes clear, *op. cit. supra*, the power to arrest without a warrant preceded the development of warrant procedure and was never supplanted by the warrant procedure. There has never been any requirement that the arrest be made immediately after the officers obtain the probable cause to make the arrest. It follows that, since the arrest here was legal, and since the admissions were made in the car immediately after the arrest, before there was any possibility of arraigning petitioner, there was no reason to exclude the admissions.

2. In his defense, petitioner called one Virlyn B. Smith, an automobile dealer in Fairburn, Georgia, where petitioner's parents lived (R. 118, 120). He testified that he had known petitioner since 1935, had gone to school with petitioner and had seen him frequently since that time, nearly every Sunday when petitioner visited his mother (R. 120-121).

On inquiry by the court the following occurred (R. 121-122):

> Q. Let me ask the witness this: Do you know whether he is known personally to a large number of people in Fairburn
>
> A. Yes, he is.
>
> Q. He knows a lot of people there?
>
> A. Yes, sir.
>
> Q. And have you ever heard people there speak of him or refer to him as knowing him?

A. Well, no, sir, I never had occasion to get into any conversation with anybody there about him, but I think he would be as well known there as I am, living there.

Q. How can you say that you know the reputation of a man in the community if you have never heard any body say anything about him?

A. Well, I know him myself.

Q. You know him yourself?

A. Yes, sir, I am speaking for me, not for the community.

Q. If you are giving your personal opinion of the man, that is not what the law permits. It is what people generally say about a person that is involved.

A. I don't know that I could speak for the people in my community.

Q. If you have not heard him discussed by people there one way or another, I don't think you could give his reputation, you could give your own opinion, but that is not what the law permits in a case like this.

A. I am afraid anything I would say would be my opinion. I don't think I would be qualified to give the opinion of the people of my town.

The court ruled that the witness had not qualified as a character witness (R. 122).

The judge had previously explained that, although the decisions usually referred to a man's reputation in the community in which he resides, he had adopted the rule "that if in any locality a man had made a reputation, then that reputation was subject to being investigated" (R. 119-120). He subsequently explained that "the only reason that I ruled out the testimony of your witness was that he said the

defendant came out to Fairburn occasionally, and he didn't know what, if any people that he knew there, he had never heard his reputation discussed one way or another. He was just absolutely vacant on the idea of his having any reputation. Now, that is the whole thing. I don't know any more, any better way to say more clearly than to say that you can prove a man's reputation in any locality where he has a reputation, but if it is a place where he goes seldom, and has no reputation, then there is no reputation to prove" (R. 144-145). It is thus clear that the judge made his ruling because of his finding that the witness did not know petitioner's reputation in the community, and not, as petitioner claims, because the witness had heard nothing bad about petitioner. This is, we submit, a logical interpretation of the testimony quoted above, and a correct ruling. As this Court said in *Michelson* v. *United States*, 335 U.S. 469, 478-489:

> * * * To require affirmative knowledge of the reputation may seem inconsistent with the latitude given to the witness to testify when all he can say of the reputation is that he has "heard nothing against defendant." This is permitted upon assumption that, if no ill is reported of one, his reputation must be good. But this answer is accepted only from a witness whose knowledge of defendant's habitat and surroundings is intimate enough so that his failure to hear of any relevant ill repute is an assurance that no ugly rumors were about.

Here the witness, who had known petitioner in school, but saw petitioner in the community only once a

week when he visited his parents, was not in a position to have the intimate knowledge which the law requires.[4]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
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[4] The petitioner called another character witness (R. 145-146) and the judge instructed the jury as to the proper weight to be accorded such testimony (R. 148).

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